

Securing the Best Placement and Earliest Release

At sentencing, most defense attorneys rightly focus on guideline objections, departures, and variances. They want to make sure not only that the sentencing guideline range comes out as low as possible, but also that the court is persuaded by any arguments for a sentence below the bottom of that range. Although working for the lowest possible sentence is the defense lawyer's most important job, defense counsel should not overlook ways to ensure that the client gets into the best possible prison and is released at the earliest opportunity.

Although it is the policy of the Bureau of Prisons (BOP) to place an individual in the least restrictive facility within 500 miles of the inmate's "release residence" for which he or she qualifies, many inmates end up serving their time far from their families and under harsher conditions than necessary. It doesn't have to be that way. There is a lot defense attorneys can do to ensure that their clients do their time in the best possible facilities. First, defense lawyers need to understand how the BOP classifies its facilities, and the characteristics of each type of facility. Second, they need to understand how the BOP decides what type of prison is appropriate for a particular defendant. Finally, defense lawyers need to know what to do to increase the chances that their clients will be sent to the prisons they want. The first step in this process is to download the BOP's *Security and Classification Manual* (Program Statement 5100.008), which lays out the BOP's rules for security classification scoring. It is available in PDF format from the bureau's Web site at



Alan Ellis, past president of the NACDL, is a nationally recognized authority in sentencing, prison matters, and postconviction remedies with offices in Mill Valley, California, Ardmore, Pennsylvania, and opening soon in Shanghai, China. He was recently awarded a Fulbright grant to conduct lectures at Shanghai, Jia Tong University's School of Law on the criminal protections afforded defendants in America. He is the coauthor with J. Michael Henderson, of the *Federal Prison Guidebook* and a contributing editor to *Criminal Justice* magazine. Contact him at aelaw1@alanellis.com or go to www.alanellis.com.

www.bop.gov. Once a defense attorney understands how the system works, there are four things he or she can do to ensure that a client serves time in the best possible facility. First, counsel should ensure the accuracy of the information on which the BOP will rely to make its designation decision. Second, counsel should score the client and search for public safety factors (PSF) to determine the appropriate security level. PSFs (such as "deportable alien") can preclude camp placement for otherwise qualified defendants. Third, counsel should consult with the client to determine which facility, at the appropriately calculated security level, the client prefers and then ask the sentencing judge to recommend that facility to the BOP, as well as to provide reasons in support of that recommendation. Counsel should, of course, suggest reasons as part of his or her request. Finally, counsel should, in appropriate cases, request self-surrender.

The most important thing defense counsel can do to ensure designation to the lowest security prison possible is to make sure that any inaccurate information in the presentence investigation report (PSR) is corrected. The BOP relies almost exclusively on the information contained in the PSR to decide where a defendant will do time—as well as to make other important correctional decisions, such as whether a defendant is eligible for the BOP's Residential Drug Abuse Program (RDAP). It is for good reason that the PSR is known as the "bible" by prisoners and BOP staff alike.

If defense counsel objects to inaccurate information at the time of sentencing and the judge sustains those objections, defense counsel must make sure that the PSR is corrected before it is sent to the BOP or, at a minimum, that formal findings are made by the judge pursuant to Federal Rule of Criminal Procedure 32(c)(1) and attached to the PSR before it is forwarded to the BOP. A finding made in the judgment in a criminal case (preferably in the statement of reasons portion) will also suffice.

For example, if the PSR incorrectly states that your client has a history of aggressive sexual behavior, even when it's not part of the conviction offense, he or she will not go to a federal prison camp despite what the otherwise calculated score might indicate or the judge recommends. Similarly, if the PSR reports that the client has a pending

criminal case, the BOP will give the client a higher security level score—even if that case was dismissed prior to sentencing. Inaccuracies like these may result in a client being designated to a higher security prison unless the inaccuracies are objected to and corrected prior to the entry of judgment.

It is also important for counsel to make sure that the PSR's criminal history score is accurate. The addition of one criminal history point may not change a defendant's criminal history category (CHC). But it can still be important to object to these seemingly harmless additions, and then to appeal if the district court denies the objection. Normally, a criminal history point that does not affect the sentencing range is "harmless error," but not always. In *United States v. Vargas*, 230 F.3d 328 (7th Cir. 2000), the Seventh Circuit remanded for resentencing based on a seemingly inconsequential criminal history point. The Court reasoned that the error was not "harmless" because it "might have affected" the district court's denial of the defendant's motion for downward departure based on the defendant's contention that his criminal history category significantly overrepresented the seriousness of his criminal history. (See U.S.S.G. § 4A1.3 (p.s.)) A single point might also affect prison designation, since the BOP now uses criminal history points to calculate an individual's security level. (See Program Statement 5100.08.) Criminal history points can affect the type of facility to which the offender may be assigned, even if the judge sentences outside the guideline range.

It is also important for defense counsel to make sure that the PSR adequately documents any drug (illegal as well as prescription) abuse or alcoholism. Many defense lawyers and defendants tend to downplay substance abuse problems, under the mistaken belief that revealing such problems can harm the client. Unless a client's substance abuse problem is adequately documented in the PSR, he or she may not qualify for the BOP's Residential Drug Abuse Program (RDAP) and will not get the chance to earn up to a one-year reduction in sentence pursuant to 18 U.S.C. § 3621(c)(2), which permits such a reduction for nonviolent inmates who successfully complete a residential drug treatment program in a BOP facility.

Attorneys often try to magnify their client's health problems in hopes of gaining sympathy from the sentencing judge. A focus on mental or physical problems can be warranted if it supports an argument for a lower sentence based either on guideline program statements, such as U.S.S.G.

§ 5H1.3 (p.s.) (mental and emotional conditions "not ordinarily relevant") and section 5H1.4 (physical condition "not ordinarily relevant"), or the nonguideline factors 18 U.S.C. § 3553(a) requires a court to "consider." Otherwise, highlighting these problems may have the unintended consequence of the client being designated either to a medical facility rather than a camp, or to a different camp that is not the client's first choice. (For a link to the BOP's memorandum, go to www.alanellis.com/CM/Publications/BOP-Medical-Classification.pdf.)

This is not to say that medical problems should be minimized. Medical problems should be accurately reported in the PSR. Otherwise, not only may the client not receive appropriate medical treatment and be required to perform physical labor precluded by a medical condition, the client may be designated to a prison that is not equipped to provide the level of care the client needs. It is also important for the PSR to list medications the client has been prescribed.

Initial placement is based on classifications that consider both security and medical needs. The BOP makes these classifications based on information in the PSR. Each defendant is assigned a security level based on offense characteristics, sentence, and history, as well as a level of care (I, II, III, or IV) based on his or her anticipated medical requirements. The facility nearest the defendant's legal residence, as reflected in the PSR, that meets the security and medical care level requirements and has bed space available is generally designated for service of sentence.

Finally, it is important to ensure that the PSR lists the correct client address. Since "release residence" is defined by the BOP as the defendant's legal address that is listed on the PSR, the BOP will attempt to house your client near that address. If that address is far from family and friends who want to visit your client and also far from the area to which your client intends to relocate upon release, you should consider requesting that another address be used.

Although it is important for defense counsel to make sure the facts in the PSR support the most favorable designation, it is also important for defense counsel to obtain a judicial recommendation supported by reasons. Unfortunately, some judges don't like to recommend particular places of confinement at sentencing, believing that they are not "correctional experts," or because they have become discouraged by letters they get from the BOP advising them that their recommendations

cannot be honored in a particular case. In these situations, counsel should point out two things. First, when the BOP fails to honor a judge's recommendation, it is usually because the judge has recommended a facility incompatible with the defendant's security level. Counsel should assure the judge that the defendant qualifies for the facility requested. Second, counsel should remind the court that, although judicial recommendations are only recommendations, that does not mean they are not important. Not only does 18 U.S.C. § 3621(b)(4)(B) specifically contemplate these recommendations, but BOP program statement 5100.08 says that the BOP welcomes a sentencing judge's recommendation and will do what it can to accommodate it. Bureau statistics show that in approximately 85 percent of the cases in which the defendant qualifies for the institution recommended by the judge, the court's recommendation is honored. However, the BOP has recently stopped writing explanatory letters to judges when recommendations are not followed.

Without a recommendation from the judge, prison overcrowding may prevent your client from being designated to the facility he or she prefers—even if the client qualifies for it and it is close to home. Should there be only one slot open at a prison and there are two defendants who want that

placement, the one with the judicial recommendation is more likely to get it. If your judge is reluctant to make recommendations, it may help to get a copy of the BOP's program statement 5100.08 and show the court the page that deals with judicial recommendations.

Sometimes an unsupported recommendation may not be enough. Before sentencing, draft the language you want the court to use to make the recommendation. For example, if the reason your client wants a particular facility is because it has the RDAP program, the court's recommendation should say that it recommends the facility for that reason. If the court agrees to include the reasons you have suggested, offer to submit your draft to the judge and the courtroom deputy clerk.

Finally, it is important to ensure that if your client is a United States citizen, the citizenship is verified by the U.S. probation officer and duly noted as verified in the PSR. This is not generally a problem for persons born in the United States, but can be especially important for naturalized citizens because, if such citizenship is not verified in the PSR at the time of initial designation by the BOP, an individual who might otherwise be eligible for placement in a minimum security camp will be designated instead to a low security prison, the next higher security level. ■